



REPUBLIC OF KENYA
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT 64 OF 2006

VIJAY KUMAR DAVALJI KANJI GOHIL.....PLAINTIFF

VERSUS

SURESH MOHANLAL FATANIA.....1ST DEFENDANT

SHANTILALA KARSHANDAS VARIA.....2ND DEFENDANT

TREO APARTMENTS LIMITED.....3RD DEFENDANT

SUNILKUMAR POPATLAL DAVDA.....4TH DEFENDANT

AMEET DIPAK BHATTESSA.....5TH DEFENDANT

CHUNILAL SHANTILAL KHIMASIA.....6TH DEFENDANT

JAYANTILAL JETHA HARJI PARMAR.....7TH DEFENDANT

JAYANTILALA K. HARIA.....8TH DEFENDANT

MAHENDRA K. PATHAK.....9TH DEFENDANT

R U L I N G

The application is a Notice of Motion expressed to be brought under Order VI rule 5A (c) and (d) Order L rule 1 of the Civil Procedure Rules and sections 3A, 27(1) and 63(e) of the Civil Procedure Act. It seeks orders

- 1. That the Plaintiff's suit herein be dismissed for want of prosecution.**
- 2. That the Plaintiff's application dated 27th April 2007 be dismissed for want of prosecution.**
- 3. That in the alternative the Applicants be granted leave of this Honourable Court to tax their costs incurred so far in the proceedings.**

The application is based on ten grounds which are cited on the face of the application. It is also supported by the Affidavit sworn by the 9th Defendant MAHENDRA G. PATHAK dated 8th May, 2008 in which he states that he has also been authorized by the 4th, 5th, 6th, 7th and 8th Defendants to swear the affidavit. The application has itself been brought by the 4th, 5th, 6th, 7th, 8th and 9th Defendants.

The 1st, 2nd and 3rd Defendants did not file any papers but they supported the application made by the other Defendants. There is an affidavit sworn by the Plaintiff in this suit erroneously titled supporting affidavit. From the body of the affidavit, it is very clear that the affidavit was sworn in reply to the Chamber Summons application dated 8th May, 2008 and the supporting affidavit to that application. It is the same application which is under consideration in this ruling.

The gist of the Plaintiff's affidavit is that there has been no delay in prosecuting the suit. The Plaintiff contends that there has been no delay for two years as alleged in the supporting affidavit but that the suit has been active as can be evidenced from the record.

I have considered the submissions by all the counsels and the affidavit sworn by the Defendants and the Plaintiff regarding the application. The order sought under item 2 of the application contradicts prayer 1 of the motion. In prayer 1 the Defendants are seeking to have the Plaintiff's suit dismissed for want of prosecution. Prayer 2 seeks to have the application dated 27th April, 2007 dismissed also for lack of prosecution. It is not indicated that prayer 2 is an alternative to prayer 1. On that ground alone the application is defective. Regarding prayer 1 for the dismissal of the suit for want of prosecution, the Applicants through the 9th Defendant has given the entire history of the instant suit and details of the applications filed by the Plaintiff which have been dismissed with costs to the Defendants. It is averred that the pleadings in this case were closed on 10th May, 2006 and that since then no steps have been taken in the matter. The record of the case shows that there has been a lot of activity, for instance, the Plaintiff filed an application 22nd February, 2006 which was heard interpartes on the 18th May, 2006. There is evidence of a lot of activity between the parties through filing and arguing of various applications between July 2006 and October, 2007. If there is any delay in the matter it is between October 2007, when a notice of motion dated 27th April, 2007 was taken out of the hearing list at the instance of the court and the 8th May, 2008 when the instant application was set out for hearing. That is not a period of 2 years. Looking at the record, the Plaintiff's application dated 27th April, 2007 was taken out of the hearing list on two occasions. In both occasions the applications were taken out at the instance of the court due to shortage of judges. It is not the correct position to state that the Plaintiff has not taken any steps to have the matter set down for hearing as intimated by the Applicants in their supporting affidavit. If anything, it is my view that the Defendants are trying to compete with the Plaintiff by filing the instant application while the Plaintiff's application which is dated 27th April 2007 has not been reached by the court for no fault of the Plaintiff. The Plaintiff should not be made to suffer by having his suit dismissed on unreasonable grounds.

I noted from the supporting affidavit that the grounds in support of this application contained on the face of the application that the Defendants were challenging the competence of this suit by invoking section 118 of the Companies Act. When Mr. Mugwuku for the Applicants made his submissions, he did not substantiate the issue of incompetence. In any event if the Defendants wish to challenge the competence of the suit, then the application should not be made under Order VI rule 5 (a), (c) and (d) as those are not the correct legal provisions in which to invoke the jurisdiction of the court for purposes of challenging the competence and the propriety, if any, of the Plaintiff's suit. I have therefore not considered the issue of the competence of the suit.

Regarding the order for taxation of the Defendants' costs incurred so far, this suit has been proceeding in the normal way. I am not satisfied that the Defendants have made any case to have their costs taxed at this stage of the proceedings. I do not see any basis upon which I can make the order sought.

In conclusion, I find no merit in this application and dismiss it with costs.

Dated at Nairobi this 14th day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Mugwuku for the Applicants

Mr. Adala for the Defendant

LESIIT, J.

JUDGE